OAH Docket No. 11-1900-19104-1
Governor's Tracking No. AR 151

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Adopted Rules of the State Department of Labor and Industry Relating to the Residential Energy Code

ORDER ON REVIEW OF RULES UNDER MINNESOTA STATUTES, SECTION 14.26

The Minnesota Department of Labor and Industry ("Department") is seeking review and approval of the above-entitled rules, which were adopted by the agency without a hearing. Review and approval is governed by Minn. Stat. § 14.26. On December 9, 2008, the Office of Administrative Hearings received the documents that must be filed by the agency under Minn. Stat. § 14.26 and Minn. R. 1400.2310. The Department supplemented the record on December 22, 2008. Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum which follows,

IT IS ORDERED:

1. The agency has the statutory authority to adopt the rules.

2. The rules were adopted in compliance with all procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400.

3. The rules are needed and reasonable, with the exception of Minn. R. part 1322.1101, subpart 8. Accordingly, this rule part is **DISAPPROVED** as not meeting the requirements of Minnesota Rules, part 1400.2100, items E and G.

4. Pursuant to Minnesota Statutes, section 14.26, subdivision 3(b), and Minnesota Rules, part 1400.2300, subpart 6, the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: December 31, 2008

/s Kathleen Sheehy for B.L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Pursuant to Minnesota Statutes, section 14.26, the agency has submitted these rules to the Administrative Law Judge for a review as to legality. The rules adopted by the Office of Administrative Hearings identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. These circumstances include situations in which a rule was not adopted in compliance with procedural requirements, unless the judge finds that the error was harmless in nature and should be disregarded; the rule is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule; the rule is substantially different than the rule as originally proposed and the agency did not comply with required procedures; the rule grants undue discretion to the agency; the rule is unconstitutional[1] or illegal; the rule improperly delegates the agency's powers to another entity; and the proposal does not fall within the statutory definition of a "rule" or by its own terms does not have the force and effect of law. [2]

Defect in Minn. R. 1322.1101, Subpart 8 – IRC Section N1101.4 – Building thermal envelope insulation:

> As proposed, this rule includes the following language:
>
> Insulation used on the exterior for the purpose of insulating foundation walls shall be a water-resistant material and comply with ASTM C578, C612, or *other approved standards*.

[Italics added.] The italicized language is unduly vague because it does not provide any information about what standards are being referenced, or by whom such standards must be approved. As such, it fails to provide adequate guidance to the regulated public regarding how to comply with the rule. As a result, this portion of the rule is unenforceable. This constitutes a defect in the proposed rules and must be disapproved pursuant to Minn. R. 1400.2100 E. and

1 To be constitutional, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980).

2 Minnesota Rules part 1400.2100.

G. To cure this defect, the Administrative Law Judge suggests that the Department clarify the provision by identifying the organizations that must have approved the standards at issue, citing the particular standards that will be deemed appropriate or deleting the reference to standards other than the ASTM standards cited in the proposed rule. These changes to the rule would be needed and reasonable and are not substantial changes from the rule as proposed.

Recommended Technical Changes

Repealer

The Notice of Intent to Adopt Rules states that all of chapter 7670 of the Minnesota Rules is being repealed in these rules. The Repealer section of the rules lists, as one of the repealed parts, rule part 7670.0350. There is no rule part 7670.0350 currently in existence. In addition, the Repealer does not list rule part 7670.0325, which does exist, and which the Administrative Law Judge presumes the Department intended to include as part of the repeal of chapter 7670. The Administrative Law Judge recommends that the Department amend the language of the Repealer, deleting part 7670.0350 and inserting part 7670.0325 as a part to be repealed.

Part 1322.0010 Definitions

A. Definitions of ASHRAE and ASTM:

The definitions section of the proposed rules includes definitions for the acronyms ASHRAE and ASTM. The definitions for these terms read as follows:

> ASHRAE. "American Society of Heating, Refrigeration, and Air-Conditioning Engineers" or "ASHRAE" means the American Society of Heating, Refrigeration, and Air-Conditioning Engineers.
>
> ASTM. "American Society for Testing and Materials" or "ASTM" means the American Society for Testing and Materials.

In a letter dated September 3, 2008, commenter Bruce Nelson of the Minnesota Office of Energy Security pointed out that the correct names of these organizations are the American Society of Heating, Refrigerating and Air-Conditioning Engineers and ASTM International. In its response to Mr. Nelson's comment, the Department stated that it did not change its definitions because the organization names as the Department stated them in the definitions section are commonly understood and both terms are used interchangeably. While this may be true, it is better practice to use the correct names of the organizations. The Administrative Law Judge recommends that the Department correct the names of

these two organizations in the definitions section; and that the definitions be shortened as follows to reduce redundant language:

> ASHRAE. ~~"American Society of Heating, Refrigeration, and Air-Conditioning Engineers" or~~ "ASHRAE" means the American Society of Heating, ~~Refrigeration~~ Refrigerating, and Air-Conditioning Engineers.
>
> ASTM. ~~"American Society for Testing and Materials" or~~ "ASTM" means ASTM International, formerly known as the American Society for Testing and Materials.

These changes to the proposed rules would be needed and reasonable and would not be a substantial change from the rules as proposed.

B. Definition of Building:

"Building" is defined in these rules as follows:

> BUILDING. Building means only a one- or two-family dwelling or portion thereof, including townhouses, that is used, or designed or intended to be used, for human habitation, living, sleeping, cooking, or eating purposes, or any combination thereof, and shall include accessory structures.

This wording defines a broad scope of uses within its parameters. Because the dwelling can be "used" for any combination of the purposes listed, a building which is used only for cooking and eating, if located in a one- or two-family dwelling, would be a "building" for purposes of the Residential Building Code. If it is not the intent of the Department to include within the scope of this definition restaurants located in structures which were originally designed as homes, the Administrative Law Judge recommends the following technical change to the definition of "building:"

> BUILDING. Building means only a one- or two-family dwelling or portion thereof, including townhouses, that is used, or designed or intended to be used, for human habitation, living~~,~~ or sleeping, ~~cooking, or eating purposes,~~ or any combination thereof, and shall include accessory structures.

This change to the proposed rule would be needed and reasonable and would not be a substantial change from the rule as proposed.

Part 1322.0015 ADMINISTRATION AND PURPOSE
Subpart 2 – Purpose

This subpart begins:

> The purpose of this chapter is to establish a minimum code of standards for the construction, reconstruction, alternation, and repair of buildings . . . .

It appears that the word "alternation" is meant to be "alteration." Assuming that that is so, the Administrative Law Judge recommends that that spelling error be corrected. This change would be needed and reasonable and would not be a substantial change from the rule as proposed.

Part 1322.1101 IRC Section N1101, GENERAL
Subpart 1 – Scope

Paragraph 7 under the "Exceptions" portion of the proposed rule states:

> This chapter does not cover buildings, structures, or portions of buildings or structures whose peak design energy rate usage is less than 3.4 Btu per hour per square foot or 1.0 Watt per hour per square foot of floor area for all purposes.

Because a Watt is already a unit of power, Bruce Nelson of the Office of Energy Security recommended that the rule refer to "1.0 Watt per square foot . . ." rather than "1.0 Watt *per hour* per square foot." He pointed out that existing rule part 7672.0200, subp. 6, uses the language he is recommending. In its December 22, 2008, response to Mr. Nelson's comment, the Department merely stated, "The draft [of the proposed rules] included the language that was consistent with the committee's recommendation and meets the technical intent of the committee."

Because the current rule language refers to "1.0 Watt per square foot," no explanation has been given in the SONAR for changing the terminology, and the advisory committee members may have erred in drafting this language, the Administrative Law Judge recommends that the Department amend this language in keeping with Mr. Nelson's suggestion. This change would be needed and reasonable and would not be a substantial change from the rule as proposed.

Rule 1322.1101, Subpart 8 – IRC Section N1101.4 – Building thermal envelope insulation

This portion of the proposed rule contains the following language:

> An R-value identification mark shall be applied by the manufacturer to each piece of building thermal envelope insulation 12 inches (305 mm) or more wide. Alternatively, the insulation installers shall provide a certification listing the type, manufacturer, and R-value of insulation installed in each element of the building thermal envelope as described in section N1101.8.

Because the purpose of these rules is to establish a minimum code of standards for the "construction, reconstruction, alternation (sic), and repair of buildings" and not to govern insulation manufacturers, the Administrative Law Judge recommends that the proposed rules be revised to state:

> If ~~A~~an R-value identification mark ~~shall be~~ has not already been applied by the manufacturer to each piece of building thermal envelope insulation 12 inches (305 mm) or more wide~~.~~ ~~Alternatively~~, the insulation installers shall provide a certification listing the type, manufacturer, and R-value of insulation installed in each element of the building thermal envelope as described in section N1101.8.

The language, as modified, would clarify the rule and would not constitute a substantial change.

Withdrawal of Requests for Hearing

The Department received thirty-two requests for public hearing on these rules. Eleven of those requests were withdrawn, leaving less than 25 requests and allowing the Department to proceed without a public hearing. Minn. Stat. § 14.25, subd. 2 requires that the Department must give written notice of the withdrawals to all who requested a hearing. The notice must include "why the request is being withdrawn" and "a description of any action the agency has taken or will take that affected or may have affected the decision to withdraw the request." The notice must also invite written comments on the withdrawal. In this case, the agency provided written notice to all who requested a hearing, with appropriate justification for the withdrawal. No comments were received in response to the notice. After examining the record, the Administrative Law Judge finds that the withdrawal is consistent with Minn. Stat. § 14.001, clauses (2), (4), and (5) in that its use in this instance was consistent with public accountability of administrative agencies, public access to governmental information, and public participation in the formulation of administrative rules.

Public Comments

As stated above, the Department received numerous requests for a public hearing. Most of the requests expressed concerns about part 1302.1102, subpart 13, IRC Section N1102.6.1 and the original proposed effective date, which was to have been five working days after publication of the notice of adoption of the rule in the State Register. As a result of discussions with those concerned about these two issues, the Department made changes to sections 1302.1102, subpart 13, and part 1322.0020, item B; and changed the effective date of the rules to June 1, 2009. The Department made several other minor changes to the rules as they were originally published. These changes were needed and reasonable and did not make the rule substantially different.[3]

Other comments included a letter from PV Burns Consulting suggesting that the minimum permeance requirement for vapor retarder material for foundation insulation set forth in 1322.1102, subpart 9, IRC Section 1102.2.6.11 should be different to be consistent with the IRC language. Gary Nelson of the Energy Conservatory submitted additional comments critical of the foundation insulation requirements.

The Department specifically chose to depart from traditional code language and requirements for basement and foundation walls because "Minnesota has one of the most complex climates for buildings since foundation walls face extreme temperature swings and different vapor pressures throughout the year."[4] The Department's decision to choose different standards for foundations is reasonable, based on the discussion in the SONAR.

A letter from the Responsible Energy Codes Alliance (RECA) recommended using the 2006 International Energy Conservation Code (IECC) as a basis for these rules. The Department has chosen, instead, to use the International Residential Code (IRC) and the International Building Code (IBC) upon which to build the rules. The IRC and the IBC are promulgated by the International Code Council (ICC) which "routinely reviews, modifies, and updates the IRC and IBC to provide the most current and complete criteria relating to the design and installation of residential building systems."[5] While the Department could have chosen the IECC as the basis for these rules, its choice of the IRC and the IBC, which are current and accepted in the building industry, was reasonable.

Bruce Nelson, with the Office of Energy Security, also expressed concerns about the wording in part 1322.1102, subpart 9, IRC Section N1102.2.10. That subpart governs insulation required in sunrooms and includes an exceptions

3 *See* Department Exhibit N, Order Adopting Rules.

4 SONAR at page 17.

5 SONAR at page 1.

clause for ceilings, walls and floors in sunrooms which are not conditioned to hold heat. Mr. Nelson's comment called for clarification about the requirements for windows in sunrooms. After reviewing the Department's response to Mr. Nelson's comments, the Administrative Law Judge does not recommend further clarification. The thermal insulation requirements apply to sunroom windows. Sunroom windows are not included in the exceptions where the sunroom is not conditioned to hold heat. The intent of the Department is clear from the wording of the rule.

B.L.N.